



March 14, 2001

Ms. Amanda Crawford
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2001-1007

Dear Ms. Crawford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144522.

The Office of the Attorney General (the "OAG") received a request for the following categories of information:

- (1) a list of documents concerning the U-Haul investigation;
- (2) all documents generated by the investigation;
- (3) a list of people who made complaints against U-Haul, or at least a list of the nature and dates of the complaints;
- (4) a list of attorneys involved in suits against U-Haul; and
- (5) a list of attorneys representing U-Haul.

You state that the requestor subsequently "limit[ed] his request to documents relevant to faulty equipment." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.110 and 552.111 of the Government Code.¹ You also state that you notified third parties of the request for information under section 552.305. In turn, U-Haul Co. of Texas, Inc. has submitted arguments to this office,

¹You initially argued that the following information was excepted from disclosure: "Attorney Notes, analysis, and work papers; confidential internal OAG e-mails and internal OAG communications ...; confidential correspondence; and investigative files including statements, Civil Investigative Demands and related material." However, you subsequently withdrew your request for a decision regarding the responsive correspondence, including e-mails. You state that you will release the responsive correspondence. We also note that you indicate that you consider certain consumer complaints responsive to the request to be public information. We therefore assume that you have released this information as well.

claiming that portions of the information are excepted under sections 552.101 and 552.110 of the Government Code. We have considered the arguments of the OAG and U-Haul and reviewed the representative sample of information submitted by the OAG.²

Both the OAG and U-Haul claim that some of the responsive information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 17.61 of the Business and Commerce Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 17.61(f) of the Business and Commerce Code provides:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the consumer protection division without the consent of the persons who produced the material. The consumer protection division shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

This provision requires the OAG to withhold from required public disclosure all documentary material the consumer protection division obtained pursuant to a Civil Investigative Demand ("CID"). Here, you state that Exhibit 5 is a sample of materials received in response to CIDs issued by the consumer protection division. Based on your argument and our review of the information, we conclude that you must withhold Exhibit 5 from disclosure under section 552.101 of the Government Code in conjunction with section 17.61 of the Business and Commerce Code unless otherwise authorized under section 17.61. U-Haul argues the examinations contained in Exhibit 4 are also excepted under section 17.61 of the Business and Commerce Code. However, the examinations, on their face, indicate that they were obtained pursuant to section 17.60 of the Business and Commerce Code. The confidentiality provision in section 17.61(f) of the Business and Commerce Code covers only "documentary material" produced pursuant to a civil investigative demand under section 17.61. Therefore, the examinations are not confidential under section 17.61(f).

With respect to the information in Exhibits 2, 4, 6, and 7, we address your argument under section 552.103 of the Government Code. Section 552.103 provides as follows:

²We assume that the 'representative sample' of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information from that submitted to this office.

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The OAG must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the OAG has investigated possible violations of the DTPA by U-Haul. Those violations arise out of either (1) alleged misrepresentations regarding U-Haul's safety and reservation system or (2) U-Haul's insurance practices. You state that the safety and reservation system issues were resolved in an "Assurance of Voluntary Compliance" entered into between the OAG and U-Haul and filed in the case of *In the Matter of the State of Texas and U-Haul Co. of Texas, Inc.*, No. 99-0595, 53d Judicial District, Travis County, Texas. However, you state that the OAG's DTPA claims based on U-Haul's insurance practices remain unresolved and pending in *State of Texas v. U-Haul Co. of Texas, et. al.*, No. 97-12120, 201st Judicial District, Travis County, Texas. Therefore, you have adequately demonstrated that litigation in which the OAG is a party is pending. Furthermore, after reviewing the submitted information, we agree that Exhibits 2, 6, and 7 relate to this litigation. Thus, you may withhold Exhibits 2, 6, and 7 from disclosure under section 552.103 of the Government Code. However, Exhibit 4 may not be withheld under section 552.103 for the reason discussed below.

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Because the information

in Exhibit 4 was shared with the opposing party's representatives, it is not protected by section 552.103(a). Further, we note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

With respect to the examinations in Exhibit 4, we will address your remaining claims under the work product privilege, the attorney-client privilege, section 552.107 of the Government Code, and section 552.111 of the Government Code. Section 552.107(1) excepts information from disclosure if "it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Rules of Disciplinary Conduct" You assert that some of the requested information is privileged under rule 503 of the Texas Rules of Evidence, and is therefore excepted under sections 552.101 and 552.107 of the Government Code. Under Texas Rule of Evidence 503, a communication is generally privileged from disclosure if it is made between a client and the client's lawyer, or the representatives of either party. You have not indicated, nor does it appear, that the communications in Exhibit 4 were made between a client and the client's attorney, or representatives of either party. Rule of Evidence 503 of the Rules of Evidence also states that "[a] communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Here, the communications in Exhibit 4 were made in front of the attorneys for the opposing party. Therefore, the examinations in Exhibit 4 are not protected from disclosure under the attorney-client privilege.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." We have read section 552.111 to incorporate, among other things, both the deliberative process privilege and the work product privilege. *See* Open Records Decision No. 615 (1993). In order to be excepted under section 552.111, information must consist of either interagency or intra-agency communication. You do not argue, nor does it appear, that the examinations in Exhibit 4 consists of either interagency or intra-agency communications.

You likewise contend that some of the requested information is excepted from disclosure under the work product privilege, as established in Texas Rule of Civil Procedure 192.5, in conjunction with section 552.101 of the Government Code. While Rule 192.5 generally protects the work product of an attorney, it does not extend to facts obtained by the attorney. *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991). Here, the examinations in Exhibit 4, by their nature, contain purely factual information obtained by the questioning attorneys. Therefore, the examinations in Exhibit 4 are not protected by the attorney work product as established in Rule 192.5 of the Texas Rules of Civil Procedure.

Nevertheless, U-Haul argues the examinations are excepted under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

U-Haul states that the examinations contain "valuable operating details of U-Haul" that are protected under the trade secrets prong of section 552.110. Furthermore, U-Haul states that operating details contained in the examinations are not routinely disclosed, even to independent U-Haul dealers, and access to the information within U-Haul is limited to upper management. U-Haul indicates that it has taken measures to guard the secrecy of the operating details by entering into agreements with the OAG. Finally, U-Haul contends that this information was developed after years of refining and at significant cost to U-Haul.

U-Haul also contends that the "techniques, procedures and information in" the examinations are protected under the commercial and financial prong of section 552.110. Specifically, U-Haul contends that the vehicle leasing business is highly competitive and release of this information "could directly affect U-Haul's success in countless pending and upcoming competitions for vehicle leasing services."

Based on U-Haul's arguments, and our review of the submitted information, we agree that some portions of the examinations that reveal the operating details, procedures, and techniques of U-Haul are protected under section 552.110(a) and (b). We have marked the information in the examinations that must be withheld under section 552.110. The remainder of the information in the examinations must be released.

With respect to the remainder of the information in the examinations, we note that some of the information is protected under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, you must withhold the Texas driver's license number and license plate number contained in the examinations under section 552.130.

We also note that the examinations contain two social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under

section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the OAG pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, you must withhold Exhibit 5 from disclosure under section 552.101 of the Government Code in conjunction with section 17.61 of the Business and Commerce Code. Furthermore, you may withhold Exhibits 2, 6, and 7 under section 552.103 of the Government Code. Finally, you must withhold the marked portions of the examinations contained in Exhibit 4 under section 552.110 of the Government Code. You must also withhold the Texas driver's license number and license plate number contained in the examinations under section 552.130 of the Government Code. Furthermore, you must withhold the social security numbers contained in the examinations to the extent they were obtained or are maintained by the OAG pursuant to a provision of law enacted on or after October 1, 1990. However, you must release the remainder of the information in the examinations.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

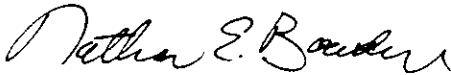
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/er

Ref: ID# 144522

Encl: Submitted documents

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